IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

MONDAY, THE 22ND OCTOBER 2007 / 30TH ASWINA 1929

ST.Rev..No. 364 of 2004

TA.56/2001 of S.T.A.TRIBUNAL,ADDL.BENCH,PALAKKAD

REVISION PETITIONER: RESPONDENT: REVENUE:

STATE OF KERALA REP. BY
THE DEPUTY COMMISSIONER (LAW),
DEPARTMENT OF COMMERCIAL TAXES,
ERNAKULAM.

BY SENIOR GOVERNMENT PLEADER SRI.MUHAMMED RAFIQ

RESPONDENT: APPELLANT: ASSESSEE:

K.P.DAVIS,
HOTEL VICTORY INTERNATIONAL
KUNNAMKULAM.

BY ADV. SMT.S.K.DEVI
SRI.M.RAJ MOHAN
SRI.SANTHOSH P.ABRAHAM
SRI.FRANKUR D.JAYAN
SRI.K.P.PRADEEP (PAYYANNUR)
SRI.SHANMUGHAM D. JAYAN
SMT.P.K.MAYA DEVI

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 22/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L. DATTU, C.J. & K.T. SANKARAN, J.

SALES TAX REVISION No. 364 OF 2004

Dated this the 22nd October, 2007

O R D E R

H.L. Dattu, C.J.:

The only question that requires to be considered and decided in this Revision is whether the assessee is eligible and entitled for exemption of purchase tax on the purchase of chicken flesh.

2. The assessee is running a bar attached hotel at Kunnamkulam. For the assessment year 1995-96, the assessee had filed his annual return. In the return so filed, the assessee had claimed exemption from payment of purchase tax under Section 5A of the Kerala General Sales Tax Act ('KGST Act' for short), on the ground that the purchase of chicken flesh is exempted from the payment of purchase tax. The assessing authority, while concluding the assessment proceedings, has rejected the claim made by the assessee and has levied the purchase tax payable under Section 5A of the KGST Act for the purchase of chicken flesh.

3. Aggrieved by the said findings and conclusions reached by the assessing authority, the assessee was before the First Appellate Authority in appeal, STA. No.79 of 2000. The First Appellate Authority has concurred with the findings of the assessing authority.

4. Aggrieved by these two orders, the assessee was before the Kerala Agricultural Income-tax Appellate Tribunal, Additional Bench II, Palakkad ('Tribunal' for short), in T.A.No.56 of 2001. The Tribunal by its order dated 25th April, 2001, has allowed the assessee's appeal relying on the observation made by this Court in **Deputy Commissioner Law** v. **Raiban Tourist Home** ((1999) 7

KTR 604). The findings and conclusions reached by the Tribunal is as under:

> "3. I have examined the facts of the case. According to the appellant, he is entitled to exemption on a turnover of Rs.2,92,257/- representing purchase of chicken meat and assessed u/s 5A in view of the decision of the Kerala High Court in Deputy Commissioner Law vs. Raiban Tourist Home (1999) 7 KTR 604. The assessing authority has stated in the assessment order that the purchase of chicken flesh for Rs.2,92,257/- have not been supported by bills. Chicken flesh not supported by bills attract levy of tax at 6% under entry 156 of the First Schedule to the KGST Act, 1963. The First appellate authority supported the view expressed by the assessing authority. But I am of the view that the decision of the lower authorities is not in order. The assessing authority has no case that the appellant has purchased live chicken which is taxable. Hence I am of the view that the purchase of chicken flesh for Rs.2,92,257/- is not taxable u/s.5A."

5. The State, being aggrieved by the findings and conclusions reached by the Tribunal, is before us in this Sales Tax Revision.

6. The State has framed the following question of law for our consideration and decision. The same is as under:

> "Whether on the facts and the circumstances of the case the Tribunal is justified in deleting the assessment made by the Assessing Authority in respect of chicken purchased for cooking and for the sale of it."

7. The one and the only question that requires to be considered and decided by this Court is whether the assessee is eligible and entitled to claim exemption from payment of purchase tax on the purchase turnover of chicken flesh.

8. The issue that was raised for our consideration and decision is no more res integra in view of what is stated by a Bench of this Court in the case of **M/s.Polakulath Tourist Home** v. **State of Kerala** ((2001) 9 KTR 511 (Ker)). In the said decision at paragraph 6, the Court has observed as under:

> "6. So far as the next contention is concerned, the case of the petitioner is that the meat is an exempted item under Schedule III to the Act. Hence, according to the petitioner, exemption ought to have been granted for the purchase turnover of chicken. We are not able to accept

this argument. There is no case that meat was sold in the bar. It is true that meat is an exempted category coming under Entry 38 of Schedule III. The Supreme Court had occasion to consider this position in the decision reported in **Deputy Commissioner of Salestax v. A.B.Ismail** – 62 S.T.C. 394. In paragraph 4 of the above decision, the Supreme Court stated as follows: "If a person goes to a butcher's shop and asks for mutton he will not be given goats nor will he be satisfied with goats. Equally so when he intends to purchase goats he will not be satisfied if mutton is supplied to him. This is because the two, both in commercial circles and in common parlance, are two different things having a distinct individuality of their own, one different from the other. It would therefore be wrong to assume, as the High Court has done, that these two goods are the same". Admittedly, the meat is not sold in the hotel. What is sold is cooked food. Hence, as rightly pointed out by the Tribunal, levy of purchase tax in respect of the turnover of chicken cannot be exempted on the ground that the meat is exempted."

9. In view of the law declared by this Court in the aforesaid decision, in our opinion, the question of law that was framed for our consideration and decision requires to be answered in the affirmative and against the assessee. Accordingly, we pass the following:

O R D E R

i) The Sales Tax Revision is allowed.

ii) The findings of the Tribunal in T.A.No.56 of 2001 is set aside.

iii) It is declared that the assessee is not entitled for exemption from payment of purchase tax on the purchase turnover of chicken flesh.

Ordered accordingly.

(H.L. DATTU)
Chief Justice

(K.T. SANKARAN)
Judge

ahz/